MARRIED TO A MYTH: 
HOW WELFARE REFORM VIOLATES THE 
CONSTITUTIONAL RIGHTS OF POOR SINGLE MOTHERS 
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INTRODUCTION

A prominent welfare rights activist once said, “[Welfare] is like a supersexist marriage. You trade in a man for the man.”1 Now, after the passage of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996,2 also known as the “Welfare Reform Act,”3 the tide has turned. By offering economic incentives that compel poor single mothers to form two-parent families, PRWORA instructs welfare recipients to trade in the man for a man in order to survive. Through these provisions, PRWORA violates the constitutional rights of poor single mothers.4 For example, while PRWORA forces unmarried mothers to work outside the home in order to receive welfare, married mothers do not have to work outside the home to obtain those same benefits.5 This provision not only encourages dependence on a male income, it withholds necessary assistance from unmarried mothers seeking to achieve financial independence.6

This kind of legislation is heavily influenced by patriarchal fatherhood initiative groups motivated by the myth that marriage is the solution to poverty among single-mother-headed families—a myth that ultimately

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* J.D. Candidate, 2006. I am grateful to Professor Mark R. Brown for his invaluable guidance throughout the research and writing process. I would also like to thank my mother, Connie L. Orr, for a lifetime of encouragement and inspiration.


3 See, e.g., 79 AM. JUR. 2D Welfare Laws § 8 (2002).

4 See discussion infra Part II.B.

5 Compare 42 U.S.C. § 607(c)(1)(B) (2000) (noting that “the individual and the other parent” can combine their efforts to meet the work requirement), with id. § 607(c)(2)(B) (noting that the single parent alone must meet the work requirement).

perpetuates the social, economic, and political inferiority of women. The marriage promotion provisions in PRWORA substantially interfere with single mothers’ right not to marry and freedom not to intimately associate, as well as discriminate against unmarried mothers of children born out of wedlock. Thus, PRWORA cannot pass constitutional muster as it is not narrowly tailored or substantially related to remedying poverty among single-mother-headed families. Instead of coercing poor single mothers into marital relationships by providing economic incentives, American welfare law should value the caregiving work for which these mothers bear sole responsibility and provide assistance to all mothers equally, regardless of their marital status. This proposal is supported by a substantial government interest in remedying past economic discrimination against women, and would rightfully compensate mothers for their unpaid and undervalued family caregiving work in the home.

There is perhaps no better time than now to review how welfare reform violates the constitutional rights of poor unmarried mothers because the number of Americans living at or below the poverty threshold has increased steadily since the mid-1970s. Furthermore, the poorest of the poor are single-mother-headed families. Although impoverished families may also be headed by unmarried fathers, this Comment focuses on the

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7 See discussion infra Part I.E.
8 See discussion infra Part II.B.
9 See discussion infra Part II.B–C.
10 See discussion infra Part III.B.
12 2003 CENSUS REPORT, supra note 11, at 13; 2004 CENSUS REPORT, supra note 11, at 10. Of the 7.6 million families living in poverty in 2003, 3.9 million were single-mother-headed families. 2004 CENSUS REPORT, supra note 11, at 10. In 2004, 4 million of the 7.8 million families living in poverty were headed by single mothers. Id.
13 D. STANLEY EITZEN & KELLY EITZEN SMITH, EXPERIENCING POVERTY: VOICES FROM THE BOTTOM 86 (2003). In 2003, 13.5% (640,000) of single-father-headed families were living below the poverty threshold, up from 12.1% (560,000) in 2002, in contrast to 28%
legal issues surrounding poor single mothers. After all, they constitute the majority of the poor and shoulder the highest risk of poverty due to the unique social, economic, and political disadvantages they face.\textsuperscript{14}

To shed light on the disadvantages that single mothers face in the American welfare system, Part I of this Comment examines the relevant Supreme Court cases which establish the fundamental right not to marry, the illegality of discrimination based on illegitimacy, and the freedom not to intimately associate. The purpose of this section is to construct a legal framework that demonstrates how PRWORA violates poor unmarried mothers’ constitutional rights. This examination is followed by a discussion regarding the current difficulties unmarried mothers endure when raising a family in poverty. It includes a discussion of how interest groups such as the National Fatherhood Initiative overlook the true needs of poor single mothers by lobbying for welfare legislation that selfishly advances its socially conservative moral agenda. Part I concludes with an examination of recent developments in welfare law. It scrutinizes particular provisions of PRWORA that provide economic incentives. These incentives coerce poor single mothers into forming marital relationships and discriminate against unmarried mothers of children born out of wedlock.

Part II of this Comment illustrates why marriage is an inadequate and unconstitutional solution to poverty among single-mother-headed families. This section is supplemented with a proposal to provide welfare to all mothers equally, regardless of their marital status. Part III of this Comment supports the proposal set forth in Part II with a review of feminist discourse on women’s caregiving work in the context of welfare. This section concludes with an evaluation of how compensating women for their family caregiving work will further the substantial government interest in remedying past economic discrimination against women. The purpose of Part III is to demonstrate that valuing women’s caregiving work in the home is a significant beginning step in generating legally appropriate and fair remedies to poverty among single-mother-headed families.

\textsuperscript{14} See 2004 CENSUS REPORT, supra note 11, at 10; EITZEN & SMITH, supra note 13, at 85; see also discussion infra Part II.D.
I. BACKGROUND

A. The Fundamental Right not to Marry

The fundamental right to choose marriage as well as the right not to choose marriage has been touted by the Supreme Court as one of the “basic civil rights of man.”15 This right is protected by the Fourteenth Amendment Equal Protection Clause, which provides that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”16 While this provision prohibits the federal government and the states from unduly burdening fundamental rights, interference with marital choice has been defended as a way to further society’s interest in promoting and preserving family relationships and the institution of marriage itself.17

The fundamental right not to marry was trumpeted in the 1967 decision *Loving v. Virginia*.18 There, a Virginia law prohibited whites from marrying people of color, and vice versa.19 The law provided that if a couple was found to be in violation, they would be guilty of a felony and sentenced to time in prison.20 In 1958, Virginians Mildred Jeter, a woman of color, and Richard Loving, a white man, married in the District of Columbia.21 That year, after returning to Virginia, the Lovings were found in contravention of the state’s prohibition on interracial marriage.22 They were forced to leave Virginia and not return for twenty-five years.23 In 1963, the Lovings sought to vacate the judgment against them on the grounds that the Virginia law violated the Fourteenth Amendment.24

The Supreme Court reversed the Lovings’ convictions and declared the Virginia law unconstitutional.25 It explained that since the ban on interracial marriage rested solely on classifications based on race, the Equal Protection Clause of the Fourteenth Amendment required it to

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16 U.S. CONST. amend. XIV, § 1.


18 *Loving*, 388 U.S. at 12.

19 Id. at 4.

20 Id.

21 Id. at 2.

22 Id. at 2–3.

23 Id. at 3.

24 Id.

25 Id. at 11–12.
subject the law to “rigid scrutiny.”26 Under this level of scrutiny, the Court found that there was no valid legislative purpose for an analysis that bases the criminality of conduct on the color of one’s skin.27

More importantly for the purpose of this Comment, the Supreme Court also noted that the freedom to choose marriage has historically been identified as one of the “vital personal rights essential to the orderly pursuit of happiness by free men.”28 The Court explained that the right to choose marriage is one of the “basic civil rights of man,”29 and pointed out that under the Fourteenth Amendment, the “freedom of choice to marry [may] not be restricted by invidious racial discriminations.”30 It asserted, moreover, that “the freedom to marry, or not marry,” under the United States Constitution, “resides with the individual and cannot be infringed by the State.”31

The Supreme Court’s opinion in Loving demonstrates that the right to choose not to marry is a logical extension of the fundamental right to marry. The Court characterized the right under the Constitution as a matter of “freedom of choice,”32 and thereby included the right not to marry in the right to choose marriage. While the Court discussed the right not to marry within the parameters of racial discrimination,33 its decision was not only an equal protection ruling about racial discrimination, but also a statement about the “basic” rights of man—the right to choose marriage.

Ten years later, in Carey v. Population Services International,34 the Supreme Court framed the fundamental right to choose marriage as an aspect of the Fourteenth Amendment Due Process Clause’s right to privacy.35 In Carey, a New York law made it a crime for any person to sell or distribute contraceptives to a person under sixteen years of age, for any person “other than a licensed pharmacist to distribute contraceptives” to people sixteen years of age and older, and “for anyone, including licensed pharmacists, to advertise or display contraceptives.”36 Population Planning

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26 Id. at 11 (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)).
27 Id.
28 Id. at 12.
29 Id. (quoting Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942)).
30 Id.
31 Id. (emphasis added).
32 Id.
33 Id.
35 Id. at 684–85.
36 Id. at 681.
Associates, Inc. (PPA) was a corporation that made mail-order sales of contraceptives. It advertised its products in New York and residents of the state placed orders with the company. However, PPA filled its mail orders without limiting availability of its products to people who were at least sixteen years old. Beginning in 1971, PPA received notices from New York state officials and the New York State Board of Pharmacy informing the company that it was violating New York law. PPA challenged the validity of the law.

The Supreme Court found that the New York law was invalid under the First and Fourteenth Amendments “insofar as it applie[d] to nonprescription contraceptives,” and, thus, enjoined the enforcement of the law. Citing Roe v. Wade, the Court explained that “[a]lthough ‘[t]he Constitution does not explicitly mention any right of privacy,’ the Court has [determined] that one aspect of the ‘liberty’ protected by the . . . Fourteenth Amendment is ‘a right of personal privacy, or a guarantee of certain areas or zones of privacy.’” It noted that “[t]his right of personal privacy ‘includes’ the interest in independence in making certain kinds of important decisions, and that an individual must have the ability to make “personal decisions relating to marriage, . . . family relationships, and child rearing” without unwarranted government intrusion.

Zablocki v. Redhail similarly sustained the fundamental right to choose marriage, and provides the modern test used to determine whether a law infringes upon this right. There, a Wisconsin law required state residents who had an obligation to pay child support to petition a court for permission to marry in order to acquire a marriage license. Under the statute, permission to marry would not be granted unless the applicant demonstrated that they fulfilled their court-ordered child support

37 Id. at 682.
38 Id.
39 See id.
40 Id. at 682–83.
41 Id. at 683.
42 Id. at 681–82.
43 410 U.S. 113 (1973).
44 Carey, 431 U.S. at 684 (alteration in original) (quoting Roe, 410 U.S. at 152).
45 Id. (quoting Whalen v. Roe, 429 U.S. 589, 599–600 (1977)).
46 Id. at 685 (citations omitted) (quoting Roe, 410 U.S. at 152–53).
48 Id. at 383–86.
49 See id. at 388.
50 Id. at 375.
obligation, and that the children supported by the applicant were unlikely to become public charges. As a result of the law, Redhail, an unemployed man who was unable to pay child support, could not obtain a marriage license.

In 1972, a paternity action determined that Redhail fathered a baby born out of wedlock in 1971. He was ordered to pay $109 per month in support until his child was eighteen years old. For the next two years, Redhail was unemployed and could not pay child support. When he applied for a marriage license in 1974, the application was denied on the ground that Redhail did not (and could not) obtain a court order granting him permission to marry since he had not fulfilled his support obligation. His child, moreover, had been receiving welfare benefits since her birth and was therefore a public charge. Although the parties stipulated that the support payments "were such that [Redhail’s child] would have been a public charge" even if he had fulfilled his support obligation, he was denied a marriage license under the Wisconsin law.

The Supreme Court held that this scheme was unconstitutional. The Court, repeating that "[m]arriage is one of the ‘basic civil rights of man,’" explained that the decision to marry constitutes an interest of central importance. The Court noted that it "ha[d] long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the [Constitution]." Although "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed," the Court concluded that "when a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to

51 Id.
52 Id. at 378.
53 Id. at 377–78.
54 Id. at 378.
55 Id.
56 Id.
57 Id.
58 Id.
59 Id. at 382.
60 Id. at 383 (quoting Loving v. Virginia, 388 U.S. 1, 12 (1967)).
61 Id. at 385 n.10 (citing Boddie v. Connecticut, 401 U.S. 371, 376 (1971)).
62 Id. at 385 (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 362, 639–40 (1974)).
63 Id. at 386.
effectuate only those interests.” The Court overturned the Wisconsin statute because it “clearly interfered] directly and substantially with the right to marry.” Ultimately, the Court’s decision strengthened the notion that the right to choose not to marry necessarily follows from the fundamental right to marry by characterizing the issue of marriage, as it comes under the Constitution, as a matter of “freedom of personal choice.”

B. Discrimination Based on Illegitimacy

The American legal system has historically discriminated against children born out of wedlock and their parents. Laws such as PRWORA, unfortunately, serve to perpetuate this prejudice. Commentators have explained that the use of a legal distinction based on illegitimacy has been justified as a way to “further society’s interests in encouraging marriage, promoting the legitimate family unit, and discouraging extra-marital liaisons.” This distinction, known as “one of society’s oldest prejudices,” is based on the notion “that illegitimacy is a sin for which someone,” namely children born out of wedlock and their parents, “should be punished.”

The illegality of discrimination based on illegitimacy was first established in 1972 in Weber v. Aetna Casualty & Surety Co. There, a Louisiana workers’ compensation statute provided that unacknowledged illegitimate children were not within the legal class of “children” entitled to compensation. Instead, they were given the less preferential status of “other dependents.” According to the statute, “other dependents” could only recover for their parent’s death if there were not enough surviving “children” to draw the maximum benefits allowed.

64 Id. at 388.
65 Id. at 390–91.
66 Id. at 387.
67 Id. at 385 (quoting LaFleur, 414 U.S. at 639).
69 See discussion infra Part II.B.
70 Cohen, supra note 68, at 679.
71 Id.
73 Id. at 167–68.
74 Id. at 168.
75 Id.
Louisiana resident and father of children classified as “children” and “other dependents,” died due to employment-related injuries. Under Louisiana’s law, Stokes’s “children” were given the maximum allowable benefits for their father’s death, leaving his “other dependents” with no compensation.

The Supreme Court held that Louisiana’s denial of equal recovery rights to unacknowledged children born out of wedlock violated the Equal Protection Clause of the Fourteenth Amendment. The Court found that states could not deny children born out of wedlock the workers’ compensation benefits that other children were entitled to after the death of their parent. It explained that when state laws make distinctions that abridge “sensitive and fundamental personal rights,” it analyzes the statute with heightened scrutiny. The appropriate inquiry, according to the Court, is whether the classification promotes a legitimate state interest and whether fundamental personal rights were jeopardized by such a classification. It held that although the Louisiana Supreme Court emphasized the state’s interest in protecting “legitimate family relationships,” “visiting this condemnation” upon a child born out of wedlock in order to express society’s disapproval of the parent’s liaisons is “illogical and unjust.” It thus invalidated the statute.

The Supreme Court addressed discrimination based on illegitimacy in the specific context of welfare in New Jersey Welfare Rights Organization v. Cahill. This case involved a New Jersey law that denied welfare benefits to households with children born out of wedlock. The New Jersey Welfare Rights Organization challenged the statute, arguing that its classification was based on the marital status of the parents, and thus impermissibly denied benefits to children born out of wedlock. The Supreme Court agreed and invalidated the law on equal protection.

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76 Id. at 165, 167–68.
77 Id. at 167.
78 See id. at 175–76.
79 Id.
80 Id. at 172.
81 Id. at 173.
82 Id.
83 Id. at 175.
84 Id. at 176.
86 Id. at 619.
87 Id. at 619–20.
It explained that the law was unconstitutional because welfare benefits are as “indispensable to the health and well-being” of children born out of wedlock as they are to any other children. It.

While children born out of wedlock have long been denied the legal entitlements accorded to legitimate children, this history of exclusion has also adversely affected the parents of children born out of wedlock. Therefore, the interests underlying heightened scrutiny for statutes that discriminate against children born out of wedlock support similarly elevated scrutiny for statutes that discriminate against their parents. In two separate cases, the Supreme Court has considered the constitutionality of legal classifications that distinguish between the parents of children born within wedlock and the parents of illegitimate children. In both cases, it determined that the challenged laws unjustifiably burdened the parents of children born out of wedlock.

The Supreme Court first offered protection to the parents of illegitimate children in *Glona v. American Guarantee & Liability Insurance Co.* There, a mother sought damages for the alleged wrongful death of her son. A lower court granted the defendant’s motion for summary judgment upon its determination that under Louisiana law, the mother had no cause of action for her son’s death because he was born out of wedlock. The law in question only allowed a surviving father or mother to sue on behalf of their deceased child. While it did not specify “‘legitimate’ father or ‘legitimate’ mother,” the Louisiana courts had ruled that a decedent must be born within wedlock in order for a parent to recover for the child’s death.

The defendant argued that since the Louisiana legislature was dealing with a “sin,” it could treat wrongful death statutes and familial recovery “selectively” and it was “not compelled to adopt comprehensive or even consistent measures.” The Court disagreed, concluding that Louisiana
had no authority to draw legal lines based on such classifications.\textsuperscript{98} It thus held the statute invalid as violative of the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{99}

In \textit{Stanley v. Illinois},\textsuperscript{100} the Supreme Court addressed discrimination against unwed fathers.\textsuperscript{101} An Illinois statute declared that the children of unmarried fathers, upon the death of the mother, were to be placed in state custody.\textsuperscript{102} In these instances, the state would not conduct a hearing on parental fitness even though such a hearing was mandatory before the children of married or divorced parents were declared dependents of the state.\textsuperscript{103} As a result of this statute, when the mother of Stanley’s children died, he lost his children to the state.\textsuperscript{104} Stanley challenged the validity of the law and the Illinois Supreme Court held that his children could be taken from his care “upon proof” that he and the deceased mother were not married.\textsuperscript{105}

When Stanley appealed this decision, the state defended the statute by arguing that “unwed fathers are presumed unfit to raise their children and that it is unnecessary to hold individualized hearings to determine whether [they] are in fact unfit parents before they are separated from their children.”\textsuperscript{106} The Supreme Court disagreed with the Illinois Supreme Court’s decision and asserted that the state’s presumption, which distinguished and burdened fathers of children born out of wedlock, was “constitutionally repugnant.”\textsuperscript{107} The Court concluded that a parental fitness hearing must be held before Stanley’s children could be removed from his custody.\textsuperscript{108} By denying Stanley a hearing while extending it to legitimate fathers when custody of their children is challenged, the statute effectively denied Stanley “equal protection of the laws guaranteed by the Fourteenth Amendment.”\textsuperscript{109}

\textsuperscript{98} \textit{Id.} at 76.
\textsuperscript{99} \textit{Id.}
\textsuperscript{100} 405 U.S. 645 (1972).
\textsuperscript{101} \textit{Id.} at 646.
\textsuperscript{102} \textit{Id.}
\textsuperscript{103} \textit{Id.} at 658.
\textsuperscript{104} \textit{Id.} at 646.
\textsuperscript{105} \textit{Id.} at 646–47.
\textsuperscript{106} \textit{Id.} at 647.
\textsuperscript{107} \textit{Id.} at 649.
\textsuperscript{108} \textit{Id.}
\textsuperscript{109} \textit{Id.}
These cases show that elimination of the “legitimate-illegitimate distinction” from the legal system is not only necessary to protect children born out of wedlock, but it is also essential to protect the parents of children born out of wedlock. Marie Prince Cohen, in *Equal Protection for Unmarried Parents*, explained that “the use of illegitimacy as a criterion for imposing legal [restraints on individuals] is ultimately attributable to the [social] prejudice and moral disapproval that surrounds illegitimacy.” Because of this likelihood, Cohen asserted that courts should cautiously analyze all legislative classifications based on illegitimacy with heightened scrutiny. This caution should attach to distinctions between parents of legitimate children and parents of illegitimate children since such classifications are the result of moral beliefs about extra-marital relations and have legally harmful consequences for both the child born out of wedlock and her parent. Thus, the intermediate level of equal protection scrutiny is the proper analysis with which to proceed when addressing legal distinctions based on illegitimacy, including classifications that prejudice single parents. As Cohen observed, such an analysis “would result in the same degree of judicial sensitivity for all individuals, parents and children, who are stigmatized solely on the basis of illegitimacy.”

C. The Freedom of Intimate Association

The First Amendment of the United States Constitution provides that “Congress shall make no law respecting . . . the right of the people peaceably to assemble.” The Supreme Court has derived the freedom to associate and its corollary, the freedom not to associate, from this language of the First Amendment. The Court has held that this includes not only the right to associate for the purpose of engaging in speech and assembly, but also the freedom of choice to enter into intimate relationships. The freedom to choose one’s intimates and to govern day-to-day relations with them has been defended as more than just the right of the opportunity to

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111 *Id.* at 707.
112 *Id.*
113 *Id.* at 707–08.
114 *Id.* at 718.
115 *Id.* (emphasis omitted).
116 U.S. CONST. amend. I.
118 *Id.* at 617–18.
access “another particular person’s physical presence,” or “to enjoy the society of certain other people”;\textsuperscript{119} it “receives protection as a fundamental element of personal liberty.”\textsuperscript{120} This is because, as the Supreme Court explained in \textit{Roberts v. United States Jaycees}, such choices “must be secured against undue intrusion by the State” due to the role of intimate human “relationships in safeguarding the individual freedom that is central to our constitutional scheme.”\textsuperscript{121}

In \textit{Roberts}, the Court held that a civic group, the United States Jaycees (Jaycees), was required to admit women as full voting members.\textsuperscript{122} In making this determination, the Court distinguished between two “senses” of the constitutionally protected freedom of association—the freedom of intimate association and the freedom of expressive association.\textsuperscript{123}

The Jaycees, organized in 1920, is a nonprofit corporation that seeks to “promote and foster the growth and development of young men’s civic organizations in the United States” and facilitate “intelligent participation by young men in the affairs of their community, state and nation.”\textsuperscript{124} While regular membership in the group was limited to young men, and included the right to vote and hold local and national office, women and older men could join as associate members.\textsuperscript{125} However, such membership was not afforded the benefits of voting or holding office in the organization.\textsuperscript{126} When two chartered groups in Minnesota admitted women as regular members, the president of the national organization informed both chapters that their charters were at risk of revocation.\textsuperscript{127} The members of these two groups then filed discrimination charges, which alleged that the denial of full membership to women in the Jaycees violated a Minnesota statute.\textsuperscript{128} The statute provided that it was a “discriminatory practice” to “deny any person the full and equal enjoyment of the . . . facilities, privileges, advantages, and accommodations” of a recreational

\begin{itemize}
\item \textsuperscript{119} Kenneth L. Karst, \textit{The Freedom of Intimate Association}, 89 YALE L.J. 624, 630 (1979).
\item \textsuperscript{120} \textit{Roberts}, 468 U.S. at 618.
\item \textsuperscript{121} \textit{Id.} at 617–18.
\item \textsuperscript{122} See \textit{id.} at 627–28.
\item \textsuperscript{123} \textit{Id.} at 618.
\item \textsuperscript{124} \textit{Id.} at 612–13.
\item \textsuperscript{125} See \textit{id.} at 613.
\item \textsuperscript{126} \textit{Id.}
\item \textsuperscript{127} \textit{Id.} at 614.
\item \textsuperscript{128} \textit{Id.}
\end{itemize}
The national organization retaliated by filing suit against various Minnesota officials seeking to prevent the state from enforcing the statute. The Supreme Court noted that its “freedom of associations” decisions have followed two lines of precedent: the freedom of intimate association, which consists of the right to choose to “enter into and maintain certain intimate human relationships,” and the freedom of expressive association, which involves the right to associate for the purpose of “speech, assembly, petition for the redress of grievances, and the exercise of religion.” Although the Court ultimately found that the freedom of intimate association was not at issue, it explained that it had long recognized the importance of affording “the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference” by government. It asserted that the protection of the choice to enter into personal relationships without unwanted government interference preserved “the ability [to] independently . . . define one’s identity that is central to any concept of [personal] liberty.”

Additionally, the Court noted that laws that interfered with an intimate relationship involving the creation of a family would be subject to heightened judicial scrutiny. “Family relationships . . . involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.” The Court asserted that relationships with qualities such as “smallness,” “selectivity,” and “seclusion from others” reflected the considerations that led to its “understanding of freedom of [intimate] association as an intrinsic element of personal liberty.” It contrasted these characteristics of association with those of a large business and explained that while the Constitution imposes constraints on the government’s power to control one’s decision to enter into a marital relationship, such constraints are not

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129 *Id.* at 614–15.
130 *Id.* at 615.
131 *Id.* at 617–18.
132 *Id.* at 620–21.
133 *Id.* at 618.
134 *Id.* at 619.
135 See *id.*
136 *Id.* at 619–20.
137 *Id.* at 620.
applicable to laws “affecting the choice of one’s fellow employees.”\textsuperscript{138}

The Court concluded that the characteristics of the Jaycees, such as its size, purpose, and selectivity, “place[d] the organization outside of the category of relationships” that are constitutionally protected by the freedom of intimate association.\textsuperscript{139}

Moreover, the Court found that the “[f]reedom of association . . . plainly presupposes a freedom not to associate.”\textsuperscript{140} The freedom of nonassociation is important in the context of intimate relationships. While the freedom of nonassociation among ideological groups is noteworthy, the examples of rape and unwanted pregnancy have been used to demonstrate that “coerced intimate associations are the most repugnant of all forms of compulsory association.”\textsuperscript{141} Thus, the constitutional protection afforded to the freedom of intimate association, and the heightened judicial scrutiny applied to laws that infringe upon such freedoms, not only includes consenting adults who affiliate by choice, but also unwilling individuals who are forced to carry on unwanted associations with others.\textsuperscript{142}

\textbf{D. Raising a Family Below the Poverty Line}

The unconstitutional nature of government incentives to marry advanced under PRWORA can only be understood in the context of the current socio-political climate in the United States, where poverty, especially among single-mother-headed families, has reached its highest level in recent years.\textsuperscript{143} The public response, influenced by fatherhood initiative interest groups, has resulted in establishing socially conservative legal measures that interfere in the private lives of poor unmarried mothers.\textsuperscript{144} After these issues are reviewed, an analysis set within the legal framework of the above-referenced cases regarding the unconstitutional nature of offering economic incentives that coerce poor single mothers to form two-parent families and discriminate against mothers of children born out of wedlock under PRWORA will follow.

Women constitute two-thirds of poor adults in the United States.\textsuperscript{145} While 10.2\% of American families were living below the poverty

\textsuperscript{138} Id.

\textsuperscript{139} Id.

\textsuperscript{140} Id. at 623 (emphasis added).

\textsuperscript{141} Karst, supra note 119, at 638.

\textsuperscript{142} Id.

\textsuperscript{143} \textit{2004 Census Report}, supra note 11, at 9, 11.

\textsuperscript{144} Mink, supra note 6, at 88–90.

\textsuperscript{145} \textit{Eitzen & Smith}, supra note 13, at 85.
threshold in 2004, four million (28.4%) single-mother-headed families were living in poverty, up from 3.6 million (26.5%) in 2002. The social phenomenon known as the “feminization of poverty” explains why disproportionate numbers of women and children live in poverty in the United States. Disproportionate numbers of women in the United States are impoverished due to the unique social, political, and economic disadvantages they face, and these numbers are even more dramatic when race and ethnicity are considered along with gender. This is because families headed by unmarried black and Hispanic women fare far worse than families headed by unmarried white women due to the additional burden of racism in our society.

Unmarried mothers endure social, political, and economic disadvantages because they face what commentators call a “triple whammy:” their families consist of minor children and one adult, and the adult is a woman. The problem with the only adult in the family being a woman is that women’s income is substantially less than men’s. Women, on average, make 77 cents to the man’s dollar. Moreover, the wages of women of color are considerably less than both the wages of men of color and white men. For example, in 1994, as compared to the average white man’s dollar, black men made 75 cents, Hispanic men made 64 cents, black women made 63 cents, and Hispanic women made 56 cents. By the year 2000, these figures did not change significantly, as

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147 2003 CENSUS REPORT, supra note 11, at 13.


149 EITZEN & SMITH, supra note 13, at 85.

150 See id.


152 See 2004 CENSUS REPORT, supra note 11, at 5.

153 Id. The female-to-male earnings ratio increased from 0.76 in 2003 to 0.77 in 2004 due to the fall in the median earnings of men, i.e., women did not make more money in 2004, men made less. Id.


155 Id. at 126.
black women earned 64 cents to the average white man’s dollar and 84 cents to the average white woman’s dollar.\footnote{Mink, supra note 6, at 82.} In 2000, Hispanic women made 55 cents to the average white man’s dollar and 72 cents to the average white woman’s dollar.\footnote{Id.} The combination of employment discrimination, job segregation, and the earnings gap serves to limit women’s income.\footnote{Albelda & Tilly, supra note 151, at 572–73.} Mothers face the additional challenge of child care, which further circumscribes their ability to obtain adequate wages.\footnote{Id.} Not only do single mothers endure these barriers to social and economic advancement, but they also raise their families without a spouse’s supporting income.\footnote{Albelda & Tilly, supra note 151, at 573.} In light of these disadvantages, commentators have explained that “welfare is a women’s issue not because women are inherently poor . . . [but] because women are made poor [by social, political, and economic constructs that appraise] women’s work—both in the marketplace and in the home—[as] less valuable than men’s work.”\footnote{APPLIED RESEARCH CTR., supra note 1, at 153.}

Socially conservative interest groups like the National Fatherhood Initiative overlook the systemic disadvantages that perpetuate poverty among single-mother-headed households and instead lobby for welfare legislation that promotes marriage in furtherance of its moral agenda.\footnote{See id.} This demonstrates that the political activities of the National Fatherhood Initiative are primarily motivated by the myth that marriage is a solution to poverty.

E. The National Fatherhood Initiative

In promoting marriage as a remedy to poverty among single-mother-headed families, fatherhood initiative groups seek to perpetuate the social, economic, and political inferiority of women. The most radical calls for marriage promotion among poor single mothers come from Wade Horn, the Assistant Secretary for Children and Families in the Administration for Children and Families (ACF) and a founder of the National Fatherhood Initiative.
The National Fatherhood Initiative, which was established in 1994, is an interest group with a self-described goal to lead “a society-wide movement to confront [the problem of] father absence.” While the group’s political activities focus on the promotion of marriage among single-mother-headed families, its website asserts that its mission is to “improve the well being of children by increasing the proportion of children growing up with involved, responsible, and committed fathers.” The group rationalizes its political activities by arguing that “[f]athers make unique and irreplaceable contributions to the lives of children; [f]ather absence produces negative outcomes for their children; [s]ocieties which fail to reinforce a cultural ideal of responsible fatherhood get increasing amounts of father absence; [and w]idespread fatherlessness is the most socially consequential problem of our time.” Public service announcements disseminated by the National Fatherhood Initiative blame the decline of families and education in America, high rates of crime, teen pregnancy, poverty, as well as an increase in taxes, on single-mother-headed families. These advertisements advocate responsible fatherhood as a solution to the social problems “created” by single-mother-headed households.

Wade Horn left his position as president of the National Fatherhood Initiative in 2001 when he was appointed by George W. Bush to serve as the Assistant Secretary for Children and Families in the ACF, which is part of the United States Department of Health and Human Services. The

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164 National Fatherhood Initiative, supra note 163.
166 See id.
167 Id.
168 National Fatherhood Initiative, supra note 163.
169 See National Fatherhood Initiative, Advertisement by the National Fatherhood Initiative, n.d., reprinted in WELFARE: A DOCUMENTARY HISTORY OF U.S. POLICY AND POLITICS, supra note 151, at 712. Please see the Appendix to view this public service announcement. While the text of this advertisement is restricted to encouraging father involvement, its underlying message ultimately faults single mothers for the “decline of families in America.” Id.
170 Id.
171 United States Department of Health & Human Services, supra note 163.
ACF administers PRWORA’s welfare program, Temporary Assistance to Needy Families. The ACF also manages other government programs such as child care, child support enforcement, and Head Start, a program that provides aid to poor pregnant women. While publicly discussing PRWORA, Horn has revealed his loyalty to the socially conservative agenda of the National Fatherhood Initiative. For example, he has stated that “[a] welfare system that helps single mothers become employed, but ignores the need to promote fatherhood and marriage, may serve only to enable unmarried women to rear children without the presence of the father.” Horn has sought to justify this view by asserting that moving “welfare-dependent single mothers into the paid labor force and putting their kids in subsidized child care[] is not enough,” because a “better world is one in which kids grow up in the context of two-parent married households.” In addition, Horn has expressed concern that “[a]n increase in the earnings of single mothers . . . may ‘decrease the probability that they will marry.’” His remedy for poverty among single mothers is to provide incentives for the formation of two-parent married households. These incentives allow only married parents access to social programs such as Head Start, public housing, and welfare. Horn has suggested that single mothers may participate in these programs only if funds are left over after all two-parent married families have taken their share. This policy places pressure on poor single mothers to marry by circumscribing their access to public benefit programs that are important to their survival. Horn has also promoted the Heritage Foundation’s proposal to provide women “at high risk of bearing a child out of wedlock a $5,000

174 A PPLIED RESEARCH CTR., supra note 1, at 151 (emphasis added) (quoting WADE HORN & ANDREW BUSH, FATHERS, MARRIAGE, AND WELFARE REFORM 3 (1997)).
175 Interview with Wade F. Horn, President of the National Fatherhood Initiative, 4 GEOPUB.POL’Y REV. 13, 16 (1998) [hereinafter Interview with Wade F. Horn].
177 Interview with Wade F. Horn, supra note 175, at 16.
178 Mink, supra note 6, at 88.
179 Id.
cash payment if [they have their] first child within marriage.\footnote{180} Horn explained that as long as these women remain married to their spouses, this payment would be distributed in annual payments of one thousand dollars over the five years following the birth of their within-wedlock child.\footnote{181}

By proposing marriage as a solution to poverty among single mothers, the National Fatherhood Initiative and its ally, Horn, ignore the social, economic, and political constructs that disadvantage women. Instead, they charge that the personal decisions poor unmarried mothers make regarding family relationships bring about their impoverished state.\footnote{182} Scholar Gwendolyn Mink has suggested that those promoting marriage as a solution to poverty assume that it is proper for the government to meddle in poor single mothers’ private lives.\footnote{183} She points out that the United States government, under the influence of interest groups such as the National Fatherhood Initiative and government administrators like Horn, reduced its role in fighting poverty by setting forth laws such as PRWORA.\footnote{184} At the same time, the government increased its coercive influence in the lives of poor women by promoting economic incentives to marry.\footnote{185} As a result, the agenda of socially conservative interest groups like the National Fatherhood Initiative forms the focus of poverty policy.\footnote{186} This policy, institutionalized by PRWORA, inappropriately forces poor unmarried mothers to abide by the government’s moral instruction and rely on a male income in order to survive.\footnote{187}

\footnote{180} Wade F. Horn, Wedding Bell Blues: Marriage and Welfare Reform, Brookings Rev., Summer 2001, at 39, 42.\footnote{181} Id.\footnote{182} Mink, supra note 6, at 89.\footnote{183} Id. at 89–90.\footnote{184} See id. at 90.\footnote{185} Id.\footnote{186} Id. For example, in 2003, the House of Representatives passed a welfare reauthorization bill called the “Personal Responsibility, Work, and Family Promotion Act” which included a program to promote marriage among welfare recipients and low-income parents. H.R. 4, 108th Cong. § 103(b) (2003). Called “Healthy Marriage Promotion Grants,” the program involved public advertising campaigns, education in high schools, and marriage skills training programs designed to reinforce welfare reform’s marriage goals. Id. § 103(b)(2)(B)(i)–(v). President George W. Bush voiced his support for this program during the 2004 State of the Union address when he announced a plan to spend $1.5 billion in federal and state funds on counseling programs that strengthen marriages among low-income parents. \textit{See White House Wants $1.5 Billion “Healthy Marriage” Plan}, CNN.COM, Jan. 19, 2004, http://www.cnn.com/2004/ALLPOLITICS/01/19/marriage.ap/.\footnote{187} Mink, supra note 6, at 90.
F. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996

In 1996, PRWORA dismantled the American welfare system. It discontinued the principal program used to assist poor families, Aid to Families with Dependent Children (AFDC), and replaced it with Temporary Assistance to Needy Families (TANF).\textsuperscript{188} The change from AFDC to TANF subjected welfare recipients to time limits, work requirements, sanctions, and contrived incentives.\textsuperscript{189} For example, TANF limits the receipt of welfare benefits to sixty months, in contrast to AFDC, which measured recipient eligibility through a determination of whether an individual qualified for assistance, not by a particular time period.\textsuperscript{190} Also, states may only receive funding for federal grants under TANF if they enact legislation that limits welfare to individuals who conform to its very rigid conditions.\textsuperscript{191}

In 2002, the National Center on Poverty Law (NCPL) published a manual to guide poverty law attorneys through the intricacies of TANF.\textsuperscript{192} Wendy Pollack, the staff attorney writing for NCPL, reported that “TANF marked a major shift in welfare policy,” noting the new time limits, work requirements, and incentives aimed at the formation of two-parent families.\textsuperscript{193} Explaining the mechanics of the law, she wrote that the states and federally recognized Native American tribes receive money from the federal government to manage their own TANF programs.\textsuperscript{194} Pollack indicated that according to the Act, states are not required to provide assistance to low income individuals, even those who are eligible under the law, because “PRWORA explicitly states that there is no federal entitlement to TANF.”\textsuperscript{195} Eligibility for cash assistance under TANF takes into consideration a household’s assets and income, and families who

\textsuperscript{188} 79 AM. JUR. 2D Welfare Laws § 8 (2002).
\textsuperscript{189} Mink, supra note 6, at 80.
\textsuperscript{190} 79 AM. JUR. 2D Welfare Laws § 8 (2002).
\textsuperscript{191} \textit{Id}.
\textsuperscript{192} NAT’L CTR. ON POVERTY LAW, POVERTY LAW MANUAL FOR THE NEW LAWYER, at vii (Ilze Sprudzs Hirsch et al. eds., 2002).
\textsuperscript{193} Wendy Pollack, \textit{An Introduction to the Temporary Assistance for Needy Families Program}, in \textit{POVERTY LAW MANUAL FOR THE NEW LAWYER}, supra note 192, at 26, 26 & n.2.
\textsuperscript{194} \textit{Id.} at 27.
\textsuperscript{195} \textit{Id.}; accord 42 U.S.C. § 601(b) (2000).
receive assistance from TANF must include a minor child or a pregnant woman.\textsuperscript{196} Extending eligibility requirements involve recipients conducting a job search and participating in other work activities, submitting to a drug screen, immunizing the children, cooperating with paternity establishment and child support enforcement, living at home and attending school in the case of teen parents, and signing and adhering to an individual responsibility plan, which may include work-related requirements and other behavioral requirements.\textsuperscript{197}

Pollack observed that the purpose of TANF is to assist needy families, but it also sets forth eligibility requirements.\textsuperscript{198} Thus, “recipients arguably have a legitimate expectation that if they meet program requirements they are entitled to benefits.”\textsuperscript{199}

As for the source of funding for TANF, Pollack explained that it is shared by the federal government and the states; states receive $16.5 billion each year from the federal government to manage TANF programs.\textsuperscript{200} This is a “flat amount,” unadjusted for inflation or changes in the number of impoverished individuals living in each state.\textsuperscript{201} States use the federal funds to provide recipients with “‘cash payments, vouchers, and other forms of benefits designed to meet a family’s ongoing basic needs (i.e., for food, clothing, shelter, utilities, household goods, personal care items, and general incidental expenses).’”\textsuperscript{202} Recipients must meet three specific requirements to qualify for assistance under TANF: (1) “the five-

\textsuperscript{196} Pollack, \textit{supra} note 193, at 28.

\textsuperscript{197} \textit{Id.} at 28–29; \textit{accord} 42 U.S.C. § 608(b) (setting forth the guidelines for individual responsibility plans). For a discussion of how PRWORA’s paternity establishment and child support requirements infringe upon associational rights, see Susan L. Thomas, “Ending Welfare As We Know It,” or Farewell to the Rights of Women on Welfare?: \textit{A Constitutional and Human Rights Analysis of the Personal Responsibility Act}, 78 U. DET. MERCY L. REV. 179, 190–94 (2001) (asserting that PRWORA’s provisions requiring mothers to cooperate with the state in establishing paternity and enforcing child support orders as a condition of assistance infringe upon poor unmarried mothers’ fundamental right to parent alone).

\textsuperscript{198} Pollack, \textit{supra} note 193, at 29.

\textsuperscript{199} \textit{Id.}

\textsuperscript{200} \textit{Id.} at 30.

\textsuperscript{201} \textit{Id.}

year lifetime limit on receipt of assistance," 203 (2) “the work participation requirements,” 204 and (3) “the assignment of a family’s child support to the state.” 205 Noting the strict and limiting nature of the eligibility requirements, Pollack pointed out that “no family that includes an adult who has received TANF assistance funded in whole or in part with federal funds may receive assistance for more than sixty months . . . [and] this is a lifetime ban.” 206 Thus, once the adult has exceeded the time limit, her entire family will be cut off from funding regardless of the number or ages of the children in the family. 207 As for the work requirement, the activities that qualify as “work” include a “job search, paid employment, unpaid employment options (i.e., work to earn the grant, commonly known as workfare), on-the-job training, and vocational training.” 208 Noting the discouraging lack of upward mobility available in these options, Pollack asserted that “[a] wide range of activities that would greatly enhance recipients’ ability to obtain and retain employment and advance in the workplace [such as] basic education, English proficiency or postsecondary education programs, longer-term vocational training programs, or activities that help recipients address barriers to employment” are not considered work under TANF. 209

With respect to the TANF population, 4% of families receiving assistance have two or more adult recipients, 35% have child-only recipients, and 60% have only one adult recipient. 210 Additionally, African Americans make up 39% of families who receive assistance from TANF and whites total 31% of TANF families. 211 Hispanic families constitute 25% of TANF families, while Asian families constitute 2.2%, and Native American families constitute 1.6%. 212 Women make up 95% of the TANF adult population. 213

207 Pollack, supra note 193, at 34.
208 Id. at 36; accord 42 U.S.C. § 607(c)–(d).
209 Pollack, supra note 193, at 36.
210 Id. at 38.
211 Id.
212 Id.
213 Creola Johnson, Welfare Reform and Asset Accumulation: First We Need a Bed and a Car, 2000 Wis. L. Rev. 1221, 1224 n.12.
The actual language of PRWORA establishes the thrust of fatherhood initiative interest groups by vilifying non-marital motherhood among poor women. Ignoring the effects of poverty on economically depressed families and communities, the preamble of PRWORA instead attempts to prove correlations between single parenting and educational decline, crime, and teen pregnancy in order to establish a link between single-mother-headed families and societal problems. For example, in addressing poor school performance among the children of single mothers, PRWORA states that “[t]he absence of a father in the life of a child has a negative effect on school performance and peer adjustment. Children of teenage single parents have lower cognitive scores, lower educational aspirations, and a greater likelihood of becoming teenage parents themselves.” In addition, the Act states that “[c]hildren of single-parent homes are 3 times more likely to fail and repeat a year in grade school than are children from intact 2-parent families.” In discussing the nexus between high crime rates and single-parent families, PRWORA asserts that “areas with higher percentages of single-parent households have higher rates of violent crime,” and that “[c]hildren from single-parent homes are almost 4 times more likely to be expelled or suspended from school.” In citing the link between never-married-mother-headed families and intergenerational single motherhood, the Act states that “[c]hildren born out-of-wedlock were more likely to have lower cognitive scores, lower educational aspirations, and a greater likelihood of becoming teenage parents themselves.”

To this end, PRWORA reveals its stance that marriage is the panacea for the disadvantages never-married-parent-headed households endure: “Being born out-of-wedlock significantly reduces the chances of the child growing up to have an intact marriage.” The Act then announces that since “marriage is the foundation of a successful society,” the purpose of

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215 Mink, supra note 6, at 80; see § 101(8)–(9), 110 Stat. at 2111–12.
216 § 101(9)(H)–(I), 110 Stat. at 2112.
217 Id. § 101(9)(J).
218 Id. § 101(9)(L).
219 Id. § 101(9)(K).
220 Id. § 101(8)(D).
221 Id. § 101(8)(E).
222 Id. § 101(1).
welfare is not only to “provide assistance to needy families,” but also to “end the dependence of needy parents on government benefits by promoting . . . marriage” and “encourage the formation and maintenance of two-parent families.”223 Earlier welfare laws stating the purpose of AFDC never referred to a governmental interest in the promotion of marriage or encouraged the formation of two-parent families.224

PRWORA depends on the correlations between single-mother-headed families and the societal dangers the Act advances in order to rationalize government interference in poor, unmarried mothers’ private lives and discrimination against mothers of children born out of wedlock. For example, the Act penalizes poor single mothers with mandatory work if they remain unmarried (i.e., mothers who receive welfare may not care for their own children at home unless they are married).225 Under the Act, a single parent is required to work thirty hours weekly to be eligible for assistance,226 as opposed to the thirty-five hours per week requirement for two-parent families (which can be satisfied by one parent while the other stays home).227 As Gwendolyn Mink has observed, the Act demonstrates

226 Id. § 607(c)(1)(A).
227 Id. § 607(c)(1)(B). Although there are three exceptions to this rule, these accommodations are insufficient with respect to alleviating the inequality fostered between married and unmarried parents under the Act. For example, there is no work requirement for teenage parents who attend school, id. § 607(c)(2)(C), and single parents with children under six years old are required to work twenty hours a week instead of thirty hours a week. Id. § 607(c)(2)(B). Also, if a single parent has problems finding or affording adequate child care, she is exempted from the work requirement, but only in limited circumstances. Id. § 607(c)(2). The child must be six years old or younger, and there appears to be no limit on the discretion states have in determining what is “unavailable” or “affordable” in terms of child care; thus it is not clear how many families actually get any relief from this exception. Id. § 607(c)(2)(A)–(C). In addition, there are no accommodations for single parents of children over six years old. Thus, single parents may be forced to leave their children alone and unsupervised in order to work. All of these accommodations fail to recognize child care of the welfare recipient’s own children as work, yet the statute treats the provision of child care services to other families as work. Id. § 607(d)(12).
how the welfare system “treats wage work as the alternative to marriage, not to welfare.” Not only does this provision seek to foster poor mothers’ dependence on a male income, it punishes mothers for their independence. Thus, PRWORA favors married mothers over unmarried mothers, and consequently impinges on single mothers’ constitutional right not to marry, discriminates against unmarried mothers of children born out of wedlock, and infringes upon unmarried mothers’ freedom not to intimately associate.

II. ANALYSIS

A. Marriage Is a Gravely Inadequate Solution to Poverty Among Single-Mother-Headed Families

Although two incomes are better than one, marriage is not a dependable solution to poverty because nearly half of all marriages fail. To be exact, 40%–50% of all marriages in the United States end in divorce. In 2003, while 7.5 per one thousand people in the fifty states married, 3.8 per one thousand people in forty-five states divorced. Also, the divorce rate is the highest among younger couples. For instance, if a person is in her teens when she marries, the marriage is more likely to end than if she is at least twenty years old at marriage. The fact that marriage is an inadequate solution to poverty is especially true for women because their incomes decrease dramatically due to the meager financial provisions they receive upon divorce.

Marriage is a deficient remedy for poverty among single mothers because women face inequality during marriage as well. Inequality in

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228 Mink, supra note 6, at 81.
229 Id.
231 Id.
233 Selmi & Cahn, supra note 230, at 294.
235 APPLIED RESEARCH CTR., supra note 1, at 153; Selmi & Cahn, supra note 230, at 294.
marriage exists because in a patriarchal society, a woman’s power within the marital relationship is limited vis-à-vis her spouse.\textsuperscript{236} Many commentators view marriage as “a reflection, source, and reinforcement of women’s oppression.”\textsuperscript{237} This is due to the use of the marriage as a defense to the charge of marital rape, the disparate treatment of parents and children based on the marital status of the parents,\textsuperscript{238} and the dated but lingering notion of coverture—where married individuals became one person under the law, the man, and women could not enter the public sphere without the approval of their husbands.\textsuperscript{239}

Women also face inequality in marriage through the social phenomenon of domestic violence\textsuperscript{240}—the leading cause of injury to American women.\textsuperscript{241} The following facts demonstrate that domestic violence is widespread in our society:

- Ninety-five percent of all domestic violence is male to female.
- Sixty percent of all married women, of all races and classes, experience physical violence from their husbands at some time during their marriage.
- Fourteen percent of ever-married women report being raped by their current or former husband, and rape is a significant form of abuse in fifty-four percent of violent marriages.
- It is estimated that two to four million women are abused each year.
- Of the at least 1.8 million women battered each year, 4,000 of them die.\textsuperscript{242}

\textsuperscript{237} Id.
\textsuperscript{239} See Taub, supra note 236, at 267.
\textsuperscript{240} See Smith, supra note 224, at 152.
\textsuperscript{241} FONOW, supra note 154, at 95.
\textsuperscript{242} Id. (citation omitted).
Scholar Anna Marie Smith reported on domestic violence among welfare recipients in her article *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*. She found that although domestic violence is a cross-class phenomenon, welfare recipients are especially vulnerable. Smith explained that this is not because poor men are pathologically violent; it is because “poor women can become trapped in abusive situations by virtue of their economic circumstances.” In addition, Smith pointed out that many women become impoverished after separating from an abusive husband and are forced to turn to government assistance programs for financial support. She concluded that one “should . . . expect to find an over-representation of battered women within low-income [communities] and within the [welfare] population.

Smith reported that numerous studies of impoverished women and domestic violence found between 15% and 30% of poor women are subjected to “physical abuse or serious emotional abuse consisting of credible threats to their lives.” She also noted that “between fifty and eighty percent of [female] welfare recipients have experienced some form of abuse,” and that “between fifteen and fifty-six percent of [female] welfare recipients reported that they had been subjected to domestic violence in the preceding twelve months.”

Because of the inequality women face during and after marriage, and the fact that marriage is a statistically unsuccessful institution, as evidenced by divorce rates, marriage is not a solution to poverty that can be relied on to alleviate the social, economic, and political disadvantages that poor unmarried mothers endure.

**B. The Marriage Promotion Provisions of PRWORA Violate Poor Unmarried Mothers’ Constitutional Rights**

Under PRWORA, mothers who receive welfare may not care for their own children at home unless they are married. This provision violates single mothers’ fundamental right not to marry. It significantly interferes

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243 Smith, *supra* note 224, at 152–58.
244 *Id.* at 153.
245 *Id.*
246 *Id.*
247 *Id.* at 153–54.
248 *Id.* at 154.
249 *Id.*
with single mothers’ decisions not to enter into marital relationships because it withholds assistance necessary to sustain economic independence from unmarried mothers who wish to engage in caregiving work in their own homes. By stipulating that mothers who receive welfare may not care for their own children at home unless they are married, PRWORA coerces single mothers into marital relationships by providing economic incentives; it, thus, directly and substantially interferes with the right not to marry. Although remedying poverty among single-mother-headed families is a compelling governmental interest, there are better or less restrictive solutions to poverty that do not adversely impact the constitutional rights of single mothers. These less restrictive alternatives will be discussed following an examination of how PRWORA discriminates against unmarried mothers of children born out of wedlock and infringes upon single mothers’ freedom not to intimately associate.

PRWORA discriminates against unmarried mothers of children born out of wedlock because it provides a benefit to mothers based on their marital status, and mothers of children born out of wedlock, by definition, are automatically excluded from this benefit. This benefit allows married mothers to stay home with their children and receive government assistance while unwed mothers must work in order to qualify for welfare.\textsuperscript{251} Although the Supreme Court has thus far only applied the rational basis analysis to laws that make distinctions between parents based on illegitimacy,\textsuperscript{252} a heightened level of scrutiny should be used when addressing discrimination against parents based on illegitimacy. Therefore, intermediate scrutiny will be applied here. Even if it is argued that intermediate scrutiny should only apply to classifications concerning children born out of wedlock, and not their parents, PRWORA, in effect, withholds the advantages gained from having a stay-at-home parent from children born out of wedlock; thus, it hurts illegitimate children by keeping benefits from them which are bestowed upon the children of married parents.

Through stipulating that mothers who receive welfare may not care for their own children at home unless they are married, PRWORA discriminates against unmarried mothers of children born out of wedlock because it withholds assistance necessary for them to achieve financial independence in order to express society’s disapproval of their intimate liaisons. A law such as this is “illogical and unjust”\textsuperscript{253} since the

\textsuperscript{251}Id.


governmental interest in “encourag[ing] the formation and maintenance of two-parent families”\(^{254}\) is not substantially related to the denial of welfare benefits that assist single-mother-headed households achieve financial independence.\(^{255}\) Although encouraging and preserving family relationships is a legitimate governmental interest, there are non-discriminatory means available to promote financial stability among households headed by mothers of children born out of wedlock that do not operate to reward or penalize families based on the parent’s marital status. These alternatives will be discussed following this section.

PRWORA infringes upon unmarried mothers’ freedom not to intimately associate by coercing poor mothers to marry through the use of economic incentives. This significantly interferes with single mothers’ decisions not to enter into marital relationships because it withholds assistance necessary to achieve economic independence from unmarried mothers who wish to engage in caregiving work in their own homes. “The decision to marry . . . is an exercise of associational choice”\(^{256}\) and economically coercive government interference with this choice intrudes upon poor single mothers’ “ability [to] independently . . . define [their own] identity[, which] is central to any concept of [personal] liberty.”\(^{257}\) The right not to intimately associate is characterized by the right to choose to begin and maintain personal relationships.\(^{258}\) The economic pressure that PRWORA places on poor single mothers to marry is a form of compulsory intimate association that unjustifiably contravenes “the individual freedom that is central to our constitutional scheme.”\(^{259}\) Although remedying poverty among single-mother-headed families is a compelling governmental interest, there are better or less restrictive solutions to poverty that do not infringe upon poor single mothers’ freedom not to intimately associate.

\(^{254}\) § 601(a)(4).
\(^{255}\) See id. § 601(a)(2).
\(^{256}\) Karst, supra note 119, at 650.
\(^{258}\) Id. at 617–18.
\(^{259}\) Id. at 618.
C. There Is a Less Restrictive and More Substantially Related Solution to Poverty Among Single-Mother-Headed Families that Does not Adversely Impact the Constitutional Rights of Unmarried Mothers by Coercing Them into Marital Relationships nor Condemn Them for Bearing Children out of Wedlock

Instead of promoting marriage as a solution to poverty, the government should focus on alleviating women’s social, economic, and political inequality. Besides the adverse constitutional implications created by the promotion of marriage as a solution to poverty among single-mother-headed families, the dilemma created by such a program is that it forecloses the option of addressing the systemic problem of women’s inequality by focusing on individual women’s decisions regarding personal relationships.²⁶⁰ Thus, the marriage promotion provisions advanced in PRWORA divert attention from the actual cause of poverty among women—the fact that women’s work is not valued.²⁶¹

Women’s work is not only undervalued in the marketplace, but also in the home, where women’s family caregiving work is completely unremunerated.²⁶² The government should value the family caregiving work for which single mothers bear sole responsibility and provide assistance to all mothers who work in the home equally, regardless of marital status. Thus, a less restrictive or more substantially related alternative to PROWRA’s provisions that withhold government benefits from unmarried or never-married mothers in the interest of remedying poverty and preserving family relationships, would be to provide welfare benefits to all mothers who choose to stay home in order to care for their children, regardless of their marital status.

III. DISCUSSION

A. Recent Developments in the Public Discourse Concerning the Welfare System and the Modern Family Unit Support a Policy in Which the Government Would Provide Financial Assistance to Poor Unmarried Mothers Who Choose to Engage in Full-Time Family Caregiving Work in the Home

In response to PRWORA, feminist scholars have sought to conceptualize welfare as “caregivers’ income.”²⁶³ These feminists, such as

²⁶⁰ Selmi & Cahn, supra note 230, at 296.
²⁶¹ Mink, supra note 6, at 90.
²⁶² Id.
²⁶³ Id.
the organization “Women’s Committee of One Hundred,” explain that “what caregivers—usually mothers—do for their families is work.”264 They argue that women’s caregiving work in the home is essential “not only to a mother’s own family but [also] to her community, the economy, and the [nation].”265 Feminists advocating this approach, which has been coined “[m]aking work pay” in the home,266 explain that they do not view caregiving work in the home as an expression of women’s “sex specific nature . . . but as a socially constructed and political practice that provides tremendous social value and whose lack of support . . . seriously disadvantages women.”267 It is critical to advance the movement to “make work pay” in the home because such a policy would mitigate poverty among single-mother-headed families without forcing them to rely on a man’s income. This would increase single mothers’ financial independence as well as their social, economic, and political equality.

The critics of the movement to “make work pay” in the home express concern that directing public assistance to mothers’ family caregiving work reinforces “the gendered division of labor and women’s traditional role in the home, [perpetuates] a maternalist norm that stifles a positive concept of female sexuality, [and] subjects family arrangements to state regulation.”268 Critics also argue that subsidizing women’s family caregiving work is “less effective at achieving [women’s] equality than challenging barriers in the workplace.”269 These critics must understand that women not only face disadvantages in the workplace, but also in the private sphere, and it is important to confront women’s inequality in all sectors. In response to such criticism, many feminists assert that “making work pay” in the home enables poor unmarried mothers to make their own decisions about “whether and when to work inside and outside the home.”270 In arguing that they are far from promoting traditional roles among women, these feminists are concerned with securing poor single mothers’ economic freedom and point out that advocating on behalf of women’s financial security “promotes women’s autonomy to make decisions about what is best for themselves and their children.”271

264 Id. (emphasis added).
265 Id.
266 Id. at 91.
267 Roberts, supra note 176, at 1037–38.
268 Id. at 1039.
269 Id.
270 Id. at 1040–41.
271 Id. at 1041.
Advocates of the movement to “make work pay” in the home often look to the welfare rights campaign of the 1960s and 1970s for insight. This movement was led by poor mothers of color who sought the right to public assistance “as compensation for their labor in the home and as a means to allow them to make the same choices about [non-market] caregiving [work] and paid employment that middle-class women made.” These visionaries—much like the current activists who are fighting for government subsidy of caregiving income—“demanded that women have the power to define their own lives” rather than adhering to government instruction to either enter the workforce or get married.

B. The Proposal to “Make Work Pay” in the Home Through Compensating Women for Their Family Caregiving Work is Supported by a Substantial Government Interest in Remediying Past Economic Discrimination Against Women

The argument that the welfare system should provide financial assistance to all mothers who choose to engage in family caregiving work in the home, regardless of their marital status, is aided by the fact that, in light of the history of discrimination based on sex in which women were relegated to unpaid and undervalued work in the home, women deserve payment for their family caregiving work as compensation for past economic discrimination. The history of discrimination against women in the United States can be traced back to the seventeenth century. Although women participated in the founding of every American colony, and the survival of these communities was dependent upon women’s labor, English colonists followed English legal practices that treated women as second-class citizens. For example, the English law of domestic relations was based on the assumption that “the husband controlled the physical body of the wife” upon marriage. Under the law, white female settlers and their descendants could not execute a contract;

272 See id.
273 Id.
274 Id. (quoting Premilla Nadasen, Expanding the Boundaries of the Women’s Movement: Black Feminism and the Struggle for Welfare Rights, 28 Feminist Stud. 271, 273 (2002)).
277 See id. at 27–28.
278 Id. at 27.
engage in simple transactions such as buying, selling, or trading goods; or execute a valid will. These women had no legal control over their labor or property and were relegated to caregiving work in the home.

For African women, the Spanish and Dutch laid the foundation for slavery and the slave trade to the Americas even before Virginians began purchasing African slaves in the early 1600s. By 1662, Virginia law decreed that “children of an enslaved woman . . . follow[ed] ‘the condition of the mother.” An enslaved woman was not only forced to work in the domestic sphere like white women, but she was also required to engage in field labor as well.

During the late eighteenth century, after the Revolutionary War ended and the modern political framework of the United States was formed, the new republic guaranteed “life, liberty, and property.” However, the patriots who so valiantly fought for national independence carefully maintained slavery and women’s second class status. Into the nineteenth century and beyond, women were still deprived of freedom and property under the new laws, and their desire for equality in the form of the right to enter into contracts and vote continued to be ignored.

While the Industrial Revolution transformed the American economy, women’s lives were still confined to the political status they endured a century earlier. For example, women were still denied the franchise and professional schools were closed to female students. White women were the poorest of free workers and caregiving work in the home remained a full-time unpaid and undervalued job for free women of all classes. For enslaved women, roles on the plantation were defined by sex, which did not limit the work enslaved women were forced to engage in, but did make them “especially vulnerable to sexual exploitation and . . . chronic ailments incidental to childbearing.” While slavery was outlawed in 1865 through the addition of the Thirteenth Amendment to the Constitution, the

279 Id. at 28.
280 Id. at 27.
281 Id.
282 Id.
283 Id. at 28–29.
284 See id. at 29.
285 See id.
286 Id. at 121, 123.
287 Id. at 123.
288 See id.
289 Id.
legacy of slavery and the laws that kept women of color from education, housing, and employment still serve as an impediment to social, political, and economic equality for black women today.\footnote{290}

Although women gained the right to vote in 1920,\footnote{291} women’s employment choices, public activism, property ownership, and educational opportunities were still limited at every level.\footnote{292} In the late 1940s and early 1950s, women were sent home from the employment they gained during World War II and were expected to engage in unpaid caretaking work in the home as a full-time job.\footnote{293} As a result, women’s age at the birth of their first child decreased, the number of children per family rose, and the number of women entering into and remaining in postsecondary education fell in comparison to men.\footnote{294} It was not until the second half of the twentieth century that legislators addressed social issues regarding the salary disparity between men’s and women’s wages or promised women equal employment opportunities.\footnote{295} As one historian observed, “Prior to the passage of Title VII [of the Civil Rights Act of 1964] . . . , private employers were free to discriminate in every aspect of the workplace.”\footnote{296}

Although women made gains in the second half of the twentieth century—such as reproductive freedoms, new positions in public office, and a raised public awareness of sexism—these gains were not widespread.\footnote{297} For example, the gap between men’s and women’s income continues today: 80% of all employed women are crowded into low-paying, sex-segregated jobs, and two out of three of all minimum wage workers in the United States are women.\footnote{298} Also, women still bear the primary responsibility of child care and household chores, and even women employed full-time in the marketplace complete up to 90% of the

\footnote{291} Ellen Carol Dubois, \textit{Harriot Stanton Blatch and the Winning of Woman Suffrage}, in \textit{WOMEN’S AMERICA: REFOCUSING THE PAST}, supra note 276, at 327, 327.
\footnote{293} See Laura McEnaney, \textit{Atomic Age Motherhood: Maternalism and Militarism in the 1950s}, in \textit{WOMEN’S AMERICA: REFOCUSING THE PAST}, supra note 276, at 448, 448.
\footnote{295} O’Melveny, \textit{supra} note 292, at 868.
\footnote{296} \textit{Id.} at 869 (footnote omitted).
\footnote{298} \textit{Id.} at 612.
tasks related to raising a family and maintaining a home—this work remains unremunerated, of course.

This long and unfortunate history of sex and race discrimination requires a firm commitment to affirmative action for women—in the home as well as the marketplace. The Supreme Court pledged to remedy past economic discrimination against women in Califano v. Webster, where it stated that “[r]eduction of the disparity in economic condition[s] between men and women caused by the long history of discrimination against women has been recognized as such an important governmental objective.” There, a provision in the Social Security Act allowed for a higher average monthly wage and thus a higher level of monthly senior benefits for a retired female wage earner compared to a retired male wage earner. The Court found that this statute, which “operated directly to compensate women for past economic discrimination,” was valid. It explained that although “[r]etirement benefits under the [Social Security] Act are based on past earnings,” the marketplace is “inhospitable to the woman seeking any but the lowest paid jobs” either due to “overt discrimination or from the socialization process of a male-dominated culture.” Therefore, the Court found that the government could provide women, who, it explained, have been “unfairly hindered from earning as much as men,” with additional benefits under the Act because such benefits remedied “some part of the effect of past economic discrimination.”

The Supreme Court’s decision in Califano supports the argument that PRWORA should provide financial assistance to all poor mothers who choose to engage in family caregiving work in the home. Women deserve remuneration for their family caregiving work in the home as

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299 Id. In May 2005, Salary.com published a study setting forth a “fair wage” for the typical stay-at-home mother: $131,471.00 per year, based on a 100-hour work week. Regina O’Brien, Dream Job: Stay-At-Home Mom, SALARY.COM, May 2, 2005, http://www.salary.com (search “Regina O’Brien” in salary.com search field; then follow “stay-at-home mom” hyperlink). The study sought to identify a fair wage for mothers since they perform the work that CEOs, day care providers, accountants, chauffeurs, counselors, chefs, nurses, laundresses, entertainers, personal stylists, and educators do on a daily basis, usually juggling these tasks at the same time. See id.

300 430 U.S. 313 (1977) (per curiam).

301 Id. at 317.

302 Id. at 314–16.

303 Id. at 318.

304 Id.

305 Id.
compensation for past economic discrimination. This is because the laws of our history forced women, free and enslaved, into unpaid household labor and women today are still disadvantaged by the legacy of such laws. Providing government assistance to poor women who choose to work in the home would thus serve to remedy some part of the effect of past discrimination as well as increase women’s social, political, and economic equality.

CONCLUSION

While the goal of PRWORA was to “end welfare as we know it,” it did not end poverty as we know it. In fact, the level of poverty in the United States has reached a recent high. Thus, it is still relevant to question the constitutionality of welfare reform even though it was enacted nearly a decade ago because single mothers who are recipients of welfare constitute a majority of the fastest growing yet least powerful group in our society: the poor. Additionally, the Act was prolonged recently under the Welfare Reform Extension Act of 2005, even though the government so far has failed to adequately address the needs of the poor through welfare reform. Therefore, it is critically important to advocate on behalf of those disadvantaged by PRWORA; otherwise, the government will continue to rely on economically coercive measures that serve to further burden poor single mothers rather than alleviate inequality.

The focus of welfare reform will only be redirected from burdening poor single mothers to ensuring their social, political, and economic equality if it is first understood that they are poor because their family caregiving work is undervalued and unpaid. Poor families headed by single mothers deserve public support just as much as two-parent married families do. Instead of coercing poor unmarried mothers into marital relationships by providing economic incentives and discriminating based on illegitimacy, American welfare law should value the caregiving work for which they bear sole responsibility and provide assistance to all mothers equally, regardless of their marital status.

308 See id. at 10 tbl. 3.
310 See discussion supra Part I.D.
311 Mink, supra note 6, at 91.
312 APPLIED RESEARCH CTR., supra note 1, at 152.
Although the institution of marriage is regarded with high importance by many in our society, the two-parent married family, as evidenced by inequality during and after marriage, as well as divorce rates, is an inappropriate and unrealistic solution to poverty. This is especially true considering that marriage promotion provisions in PRWORA violate single mothers’ constitutional right not to marry, discriminate against unmarried mothers of children born out of wedlock, and infringe upon unmarried mothers’ freedom not to intimately associate.

In contrast to current policy, welfare must be used as a vehicle to increase poor single mothers’ equality and opportunity rather than limit it. Generating solutions to poverty among single-mother-headed families not only requires an attack on marketplace biases, such as employment discrimination, job segregation, and the earnings gap, but it also requires societal and financial recognition of the value of women’s family caregiving work. These solutions will facilitate women’s economic security and freedom without fostering dependence on a man as well as substantially increase poor unmarried mothers’ social, economic, and political equality.

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313 Id. It is not the purpose of this Comment to question the validity of the institution of marriage. For example, it is acceptable for the government to facilitate marriage through the provision of marriage licenses, etc. However, government support of marriage by giving special benefits to married individuals while excluding the unmarried is highly questionable because it violates the doctrine of unconstitutional conditions. See, e.g., Dolan v. City of Tigard, 512 U.S. 374, 385 (1994). This doctrine states that the government may not grant a benefit on the condition that the beneficiary surrenders a constitutional right. Id. The government is thus prohibited from taking sides in marriage under this doctrine. For example, the government’s provision of benefits incidental to marriage under PRWORA is conditioned upon poor single mothers surrendering their fundamental right not to marry and freedom not to intimately associate. See 42 U.S.C. § 607(c)(1)(A)–(B) (2000). This condition is unconstitutional because poor single mothers are forced to surrender these rights in order to obtain a benefit critical to their family’s survival.

314 See supra text accompanying notes 230–42.

315 See supra note 232 and accompanying text.

316 APPLIED RESEARCH CTR., supra note 1, at 152.

317 Id. at 153.
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